84-51
No. ____

IN THE

Supreme Court of the United States

1984 TERM

FLAV-O-RICH, INC.,
Petitioner,

v.

NORTH CAROLINA MILK COMMISSION,
HERBERT C. HAWTHORNE, VILA M. ROSENFELD,
ANNA G. BUTLER, RUSSELL E. DAVENPORT
CHARLIE L. HARDEE, INEZ M. MYLES, B.F. NESBITT,
KATHRYN G. KIRKPATRICK, AND DAVID A. SMITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the courts below have erred in applying the standards announced by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943) ("*Parker*") and *California Retail Liquor Dealers* v. *MidCal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*MidCal*") with the result that the North Carolina Milk Commission ("Commission"), its members and staff continue to squelch price competition in the sale of fluid milk products in North Carolina in *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980)?

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Petitioner, Flav-O-Rich, Inc. ("FOR"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-referenced case on April 12, 1984.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit was filed on April 12, 1984, No. 83-2066. The opinion and judgment of the United States District Court for the Eastern District of North Carolina were entered October 27, 1983, No. 82-1172-CIV-5, but are not yet reported. The opinions are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 12, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1980).

STATUTORY PROVISIONS INVOLVED

The question presented by this case involves the applicability of the proscriptions of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980), to the price stabilizing activity of the Commission, its members and staff.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On October 18, 1982, FOR filed the Complaint in this action against the Commission and its members asserting jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1332(b), 1337, and 1343. The complaint sought injunctive and declaratory relief from the enforcement of any statute, regulation, or Commission policy which caused, or was used by the Commission, its staff or members, to force FOR to divulge its confidential cost and price information to its competitors, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

On October 22, 1983, the district court entered an Order and Memorandum Opinion concluding that the respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, pursuant to this Court's holding in *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969). The district court found specifically that the milk industry in North Carolina is similar to the container industry in its marketing conditions and concluded that the exchanges of proprietary price and cost information by the staff and members of the Commission tend to

stabilize wholesale milk prices in the milk industry in North Carolina in *per se* violation of § 1 of the Sherman Act. However, then the district court also held that the conduct at issue met the requirements for antitrust exemption enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943) ("*Parker*") and granted summary judgment for the respondents and against FOR. (App. at 3a). On appeal, the Court of Appeals affirmed the district court in an unpublished *per curiam* opinion issued on April 12, 1984. (App. at 1a). The Court of Appeals affirmed by referring to the reasoning and conclusions of the district court.

B. Statement of Facts.

FOR, an agricultural cooperative association organized and existing under the laws of the Commonwealth of Kentucky, is a subsidiary of Dairymen, Inc. ("Dairymen"). Dairymen is also an agricultural cooperative association organized and existing under the laws of the Commonwealth of Kentucky. Dairymen has approximately 8,000 dairy farmer members in seventeen states, including approximately 400 in North Carolina.

FOR is authorized to do business in eleven states, including North Carolina. It has three operating divisions and milk processing plants in North Carolina, located in Durham, Greensboro, and Wilkesboro. Each of these three divisions has a separate license to distribute milk in North Carolina. The Commission exists pursuant to the provisions of Article 28B of Chapter 106 of the North Carolina General Statutes. The Commission, its staff and members have only those powers which are specifically set forth therein. *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976) ("*Arcadia*"). The purpose of the Commission, as conceived by the North Carolina General Assembly and as stated in the Commission's own rules and regulations, is "to ensure the con-

sumers of North Carolina an adequate supply of milk." 4 North Carolina Administrative Code 7.0101. Its members are equally divided between five milk industry representatives (two milk producers, two milk processor representatives, and one milk retailer) and five non-milk industry representatives. N.C.G.S. (North Carolina General Statutes) § 106-266.7(a).

On November 10 and December 8, 1981, and May 3, 1982, the members and staff of the Commission requested that the Durham division of FOR disclose prices charged by it to certain of its customers. Disclosure of this information to the members and staff of the Commission would have been tantamount to public disclosure and would have had a detrimental effect on competition. Accordingly, FOR declined to produce the requested information. On October 12, 1982, the Commission suspended the license of FOR's Durham division to distribute milk in North Carolina, effective November 12, 1982, for its refusal to produce the pricing records. FOR immediately filed this action.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting the Writ sought by FOR. First, the courts below, in deciding a critical issue of federal law—the applicability of the antitrust laws which protect our free enterprise system—have erred in applying the standards announced by this Court in *Parker*. Supreme Court Rule 17.1(c). Second, in determining that the price stabilizing activities of the Commission, its members and staff were exempt from the antitrust laws, the Fourth Circuit has rendered a decision which is in direct conflict with the decisions of the Ninth Circuit in *Knudsen Corp.* v. *Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982) ("Knudsen") and *Miller* v. *Ore-*

gon Liquor Control Commission, 688 F.2d 1222 (9th Cir. 1982). Supreme Court Rule 17.1(a).

We discuss each of these reasons in turn.

I.
THE COURTS BELOW HAVE MISCONSTRUED THIS COURT'S DECISIONS DEFINING THE SCOPE OF THE STATE ACTION EXEMPTION TO THE ANTITRUST LAWS

This Court first articulated the state action exemption to the antitrust laws in *Parker*. At issue in *Parker* were mandatory participation marketing proration programs imposed upon the state's raisin growers by a state commission. This Court upheld the commission's authority to impose the program on the raisin growers because the Sherman Act regulates only conduct of individuals and not the conduct of states, unless such state conduct impairs national control over commerce. To qualify for exemption, *Parker* held that state action must "derive its authority and efficacy from the legislative command of the state" and not be "intended to operate or become effective without that command." Thus, *Parker* did not grant a blank check to states or their instrumentalities. Unless challenged actions are pursuant to the explicit legislative command of the state, they are not exempt. This Court has frequently recognized that the *Parker* antitrust exemption should be strictly construed in that such fundamental antitrust policies as established in the Sherman Act should not be displaced unless the two policies are clearly repugnant. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978).

Subsequent to *Parker*, this court has, in reviewing numerous claims for the state action exemption, considerably clarified the scope of its ruling in *Parker*.

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *reh. denied*, 423 U.S. 886 (1975), the Court imposed liability upon a state agency, the Virginia Bar, where anti-competitive activities in conjunction with its statutorily authorized power in such conduct did not amount to an act of the sovereign state. In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), this Court held that parties other than the state could not claim *Parker* exemption unless such conduct was compelled by the state and that such compulsion was explicit. The holding in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), *reh. denied*, 434 U.S. 881 (1977), defined what is meant by a sovereign act. The court permitted conduct similar to that in *Goldfarb* becuase that conduct was explicitly demanded by the Arizona Supreme Court in its exercise of its sovereign control over the practice of law in that state. In *Lafayette* v. *Louisiana Power and Light Company*, *supra*, the court held that cities, political subdivisions, agencies, and other entities inferior to the sovereign state were subject to the antitrust laws unless such conduct was undertaken pursuant to a state's explicit policy and under a state's active supervision. *Lafayette* further held that the anti-competitive nature and effect of the act had to have been contemplated by the sovereign in order to enjoy *Parker* exemption.

These holdings were synthesized in *California Retail Liquor Dealer Association* v. *MidCal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*MidCal*"). There, the California statute at issue required wine wholesalers to file price schedules with the state and further prohibited the sale of wine below the prices set forth in those schedules. Mid-Cal, a wine wholesaler, was charged with selling wines for which no price schedule had been filed and with selling other wines at prices less than the prices set by the price schedules which had been filed. It sought to enjoin the statute on the grounds that it violated the Sherman Act.

The lower court agreed and enjoined enforcement. The issue presented for review by this Court was whether the California pricing program was exempt from Sherman Act scrutiny by reason of the *Parker* exemption. In holding that the exemption was not available, this Court laid down the following two-prong test:

> First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.

445 U.S. at 105.

This Court then ruled that the California wine pricing system satisfied the first prong by forthrightly stating its purpose to permit resale price maintenance, but that it did not meet the second requirement of active supervision by the state. It held:

> The State simply authorizes price-setting and enforces the prices established by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' (citation omitted.)

445 U.S. at 105-106.

MidCal thus made it clear just how narrow the state action exemption set forth in *Parker* is. To pass the *MidCal* test, the challenged restraint of trade must, first, be undertaken pursuant to a clearly articulated and affirmatively expressed state policy, and, second, be actively supervised by the state itself.

Finally, in *Hoover* v. *Ronwin*, ____ U.S. ____, 80 L.Ed.2d 590 (1984) ("*Ronwin*"), this Court held that a significant degree of independence between the state and the challenged agency requires a further analysis of the

specific complained of act to determine whether such act can fairly be said to be that of the state itself. This analysis is conducted through the use of the two-pronged *MidCal* test. This Court reasoned that:

> Closer analysis is required when the activity at issue is not directly that of the legislature or Supreme Court, but is carried out by others pursuant to state authorization. *See, e.g., Community Communications Company* v. *City of Boulder*, 455 U.S. 40 (1982); *California Liquor Dealers* v. *MidCal Aluminum*, 445 U.S. 97 (1980); *New Motor Vehicle Board of California* v. *Orrin W. Fox Company*, 439 U.S. 96 (1978). In such cases, it becomes important to insure that the anti-competitive conduct of the State's representative was contemplated by the State. *City of Lafayette* v. *Louisiana Power and Light Company*, 435 U.S. 389, 413-415 (1978); *see New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 369-70 (9th Cir. 1974). If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. . . . The court also has found the degree to which the state legislature or Supreme Court supervises its representative to be relevant to the inquiry. *See MidCal Aluminum, supra*, at 105, 63 L.Ed.2d 233, 100 S.Ct. 937; *Goldfarb, supra*, at 791, 44 L.Ed.2d 572, 95 S.Ct. 2004. When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or Supreme Court, we need not address the issues of "clear articulation" and "active supervision."

80 L.Ed.2d at 599-600.

The independence of the Commission in the case at bar requires the specific conduct at issue must also pass both prongs of the *MidCal* test and the activity of the Commission, its members and staff at issue is this action fails to

satisfy either of the two-prongs of the *MidCal* test. For the following reasons, the lower courts erred in reaching an opposite conclusion.

A. The Lower Courts Erred In Holding That The Activity Of The Commission, Its Members And Staff At Issue Is This Action Met The First Part Of The Two-Prong MidCal Test.

The first prong of the *MidCal* test requires that the state's policy with regard to the challenged action be "clearly articulated and affirmatively expressed." In this case, the conduct which the lower courts held to be in violation of the Sherman Act is the exchange of price and cost information among the Commission members and staff, FOR's competitors and even the public. As FOR established in the lower courts, this restraint of trade has not been undertaken pursuant to a clearly articulated and affirmatively expressed state policy authorizing such exchanges of price information. The North Carolina legislative scheme grants to the Commission the authority to set minimum and/or maximum wholesale milk prices in North Carolina if it ever desires to implement a program to do so fairly and with proper notice. The Commission, however, has never done so. In fact, in addition to failing to implement that policy, it explicitly violates another clearly articulated state policy.

N.C.G.S. § 106-266.8(12) *specifically prohibits* the public dissemination or exchange of price and cost information by the Commission, its members and/or staff. That statute provides that the Commission may make such information public *only after it is combined with other such information for a given milk market or markets*. Clearly, the North Carolina General Assembly has recognized that the dissemination of information with respect to specific prices and costs would have an anti-

competitive effect on the North Carolina wholesale milk industry, and that is why it required the Commission to "combine such information" with other information before making it public. In other words, while publication of data containing totals and averages for a market or markets is permitted, the publication of individual data is expressly prohibited.

N.C.G.S. § 106-258 is even more explicit. That statute provides:

> Any individual plant records shall be treated as confidential by anyone handling them, and such individual records shall not be published or made accessible to any unauthorized person or representative.

Nevertheless, as established in the lower courts, the Commission and its staff do share with other processors and even the public the cost information obtained from milk processor records. Such anti-competitive conduct is neither required nor authorized by the state and, in fact, is proscribed by the state, and is thus in direct *contravention* of state policy. Certainly, such conduct does not meet the first prong of the *MidCal* test, and the lower courts erred in so concluding.

Further, had the North Carolina legislature contemplated or anticipated such exchanges, it would not have required that plant price and cost records be treated confidentially. Because such confidentiality is explicitly required by N.C.G.S. § 106-258 as to such records, the legislature did not intend (and it therefore is not the policy of the state) to allow the free exchange and dissemination of the proprietary information contained in those records and the stabilization of milk prices in this fashion. Directly on point is *Community Communications Company* v. *City of Boulder*, 455 U.S. 40 (1982), where this court found that:

tions Company v. *City of Boulder*, 455 U.S. 40 (1982), where this court found that:

> A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can these actions be truly described as 'comprehended within the powers *granted*,' since the term 'granted' necessarily implies an *affirmative addressing* of the subject by the State. (Emphasis by the court and added.)

455 U.S. at 55.

Likewise here, the exchanges of proprietary price and cost information in which the Commission, its members and staff have engaged are not within the powers granted to the Commission by the North Carolina legislature.

Even if the district court below had determined that the statutes authorized the Commission to regulate processor or wholesale milk prices in North Carolina, it does not necessarily follow that the Commission could do so in an anti-competitive fashion. As this Court noted in *City of Lafayette* v. *Louisiana Power & Light Company, supra*,:

> . . . [E]ven a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.

435 U.S. at 417.

Clearly, in the instant case, the legislature did not contemplate the manner in which the Commission, its members and staff have sought to disseminate price data. First, as already stated, the legislature has expressly prohibited the exchange of individual processor prices. Second, while the legislature has authorized the fixing of processor prices, it conditioned its authorization with a requirement that the Commission first hold a public hear-

ing. N.C.G.S. § 106-266.8(10)b. To be sure, the legislature did not intend for the Commission, its members and staff and the state's processors to fix prices through private meetings, telephone conversations and correspondence.

Furthermore, the anti-competitive conduct in disseminating this pricing information to stabilize prices is contrary to the statement of public policy contained in the North Carolina Statutes creating the Commission. As provided in N.C.G.S. 106-266.19, the purpose and policy of the State of North Carolina in passing the milk law is to *preserve* competition, not destroy it. As this below cost sales prohibition indicates, it is the purpose of the Commission to prevent the destruction of competition in the milk industry in North Carolina. The anti-competitive conduct at issue in this action could hardly be less consistent with this statement of the state's public policy and the courts below erred in failing to so recognize.

Although the lower courts correctly recognized that no North Carolina policy authorizes the exchanges of price and cost information challenged by FOR, the courts nevertheless concluded that this illegal conduct met the first prong of the *MidCal* test for antitrust protection because the prohibited dissemination of price and cost information that occurred was somehow "incidental" to other specific powers granted to the Commission by the North Carolina legislature. Thus, the lower courts held that the price information exchanges, which result only "incidentally" from the Commission's powers, are somehow authorized pursuant to a "clear ly articulated policy" of the state. As established, any exchange of price information is specifically prohibited by the legislature. That being so, the legislature could not have intended that the Commission, its members and staff could avoid that specific prohibition as an "incidental" part of other

provisions of the statute. Furthermore, even if the legislature had so intended, that intent could, under no stretch of the imagination, be said to be "clearly articulated and affirmatively expressed" as required by *MidCal*. Indeed, to conclude that "incidental" price exchanges are part of a "clearly articulated and affirmatively expressed" state policy is a contradiction in terms. Such a conclusion extends the protection of *Parker* far beyond the limits established by this Court in *MidCal* and is clearly in error.

Even if the "incidental" standard developed by the lower courts in their decisions is the correct standard, the lower courts' application of that standard to the *facts* of this case is in error. FOR established in the district court that the Commission disseminates confidential price and cost information in five ways. As to each, the lower courts held that they occurred "incidental" to specifically enumerated powers granted to the Commission by the legislature. However, as to each type of exchange, the lower courts have clearly erred in so concluding.

For example, FOR proved, and the district court found, that price information has been repeatedly and continuously exchanged between certain processors and the Commission staff through a procedure whereby the processors report to the Commission the wholesale prices charged by themselves and their competitors in a given market. (App. at 5a.) The unlimited exchange of pricing information is then used by FOR's competitors and the Commission to stabilize wholesale milk prices in that area by notifying each other of the price and bringing about price alignment in the market. While the lower Courts found that such exchanges violated Section 1 of the Sherman Act, they also held that they were the direct result of attempts by the Commission to prevent below-cost sales, one of its legislatively enumerated powers. However, in no way are the exchanges between processors and Com-

mission staff necessary to the enforcement of the below-cost statute or the prevention of below-cost sales or any other stated policy and they serve no legitimate purpose. Indeed, as noted above, such exchanges are expressly prohibited by the confidentiality requirements of the Commission's regulations, which apply with equal strength to the Commission's below-cost functions. Certainly, such exchanges are not pursuant to any state policy and are not entitled to *Parker* exemption.

In another example, FOR established to the satisfaction of the District Court that price exchanges occur between processor representatives and members of the Commission staff at various processor meetings called by the Commission. (App. at 5a.) Those meetings have included meetings of the "Eleven Man Committee," all of whose members are representatives of competing processors, the "Processor Information Committee," all of whose members are representatives of competing processors, and several occasions where representatives of competing processors were directed to meet with the Commission's "Cost Procedure Committee." Indeed, as indicated hereinabove, the use of below cost investigations and the filing of price and cost data in connection therewith as a method of "stabilizing the industry" was suggested by one of these processor committees. Such price exchanges are clearly *not* contemplated by the statute authorizing such meetings. The fact that, as the District Court found, *meetings* with processors to discuss investigations and hearings and retail and wholesale prices may be within the legislative mandate, certainly does *not* authorize the price exchanges at such meetings in order to stabilize the North Carolina wholesale milk market. Price exchanges at such meetings can have no other purpose. The application of an "incidental" standard to find such unauthorized and illegal activity at those

meetings protected under the Sherman Act is clearly in error.

As previously established by FOR and as found by the district court, the North Carolina milk industry is highly competitive and is characterized by a small number of sellers, a large number of buyers, little perceptible difference between brands of milk, and an atmosphere in which the primary means of competition among processors is aggressive pricing. (App. at 5a.) The District Court also found that although small or moderate fluctuations in price do not have a significant effect on the total volume of milk and dairy products sold in North Carolina, competition through price is significant in North Carolina to the extent that the individual seller may increase its share of the market by taking customers away from its competitors. (*Id.*) Further, with the obvious short shelf-life of milk, milk orders are, by necessity, placed on the basis of short-term needs. (*Id.*) Having made such findings and concluding that FOR established each of the factual and legal criteria necessary to prove a violation of the Sherman Act, it was error under these facts for the lower courts to protect the challenged conduct due to it being "incidental" to a clearly expressed policy of the state. The price exchanges established in this case occurred well outside the legislative mandate of the Commission and they clearly are not part of any clearly expressed and affirmatively stated state policy to stabilize wholesale milk prices in North Carolina through such exchanges.

The lower courts clearly erred in holding that the first prong of the *MidCal* test has been met in this case. The conduct at issue in this action is not pursuant to any clearly stated and affirmatively expressed policy of the state of North Carolina. In fact, it is contrary to the stated policies of the state. The lower courts erred and

the judgment entered by the district court in favor of the Commission should be reversed and judgment entered for FOR.

B. The Lower Courts Erred in Holding that the Activity of the Commission, its Members and Staff at Issue in this Action Met the Second Part of Two-Part MidCal Test.

The second prong of the *MidCal* test was analyzed only briefly by the lower courts. They found that because the Commission must hold regular meetings, N.C.G.S. § 106-266.7(j), and because of its supervision of the below-cost statute with its consequent flow of price and cost information brought about this litigation, that "this supervision clearly meets the second prong of the test." This conclusory statement does not adequately or accurately address the requirement of the second prong of the *MidCal* test, and is in error.

MidCal specifically requires that for the applicability of the *Parker* exemption, the challenged restraint of trade must be "actively supervised *by the state itself.*"

This requirement is not satisfied by a carte blanche grant of regulatory powers which permit industry representatives to regulate themselves. The reason for such a rule is simple. If the state merely turned its power over to representatives of the industry to be regulated, the industry would be regulated in the interest of the industry and not in the interest of the public. That is precisely what has happened here.

As established in the district court, the primary loyalty and accountability of at least half of the members of the Commission are to the sectors of the milk industry by whom they are employed and not to the state or to the public intended to be represented by the state. In other words, these Commissioners lack the "independence"

from the industry that has historically been required of state agencies for *Parker* immunity. In such a case, the state's policy cannot be said to be "actively supervised by the state itself."

It is precisely this lack of independence that distinguishes *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) reh. den. 423 U.S. 886 (1975) ("*Goldfarb*"), from *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) reh. den. 434 U.S. 881 (1977) ("*Bates*"). In *Goldfarb*, the state agency claiming the state-action exemption for the fixing of lawyer's fees was the state bar association, an association of lawyers. This, the court said, meant that the lawyers and not the state were regulating the fees. The industry representatives on the Commission, given their interest and lack of affiliation with the state, are in precisely the same role as the members of the State Bar of Virginia in *Goldfarb*. As noted by this Court in *Ronwin* at n.20:

> . . . Goldfarb involved procedures that were not approved by the state supreme court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself.

On the other hand, in *Bates*, the regulation of the advertising regulations alleged to violate the Sherman Act was by the Arizona Supreme Court, a state agency clearly independent of the lawyers being regulated. Thus, the regulatory scheme in *Goldfarb* failed while the one in *Bates* passed muster in this Court.

Clearly, *Goldfarb* and not *Bates* is applicable to the instant case. The State of North Carolina itself has never actively supervised the unlawful exchanges of information at issue in this action.

Moreover, the exchanges of information at issue in this action are accomplished by the Commissioners acting both individually and in conjunction with other private parties industry representatives. The state cannot give immunity to private parties under the Sherman Act simply by authorizing them to violate the Act. *MidCal, supra; Goldfarb, supra.*

Under all the facts of the instant case, it is clear that the acts complained of are not exempt from the Sherman Act. First, the state clearly does not have a policy against free competition in the milk industry. The Supreme Court of North Carolina has expressly stated that the "below cost" statute which respondents contend authorize their action is intended to *promote* competition and not to destroy it. *Appeal of Arcadia Dairy Farm, Inc., supra.* Furthermore, although the members of the Commission have from time to time recommended to the Commission that it limit competition by setting minimum and maximum wholesale prices for milk processors, the Commission has never done so. Second, it is clear that the persons engaged in the unlawful exchange of information are not adequately supervised *by independent state officials.* To the contrary, one-half of the members of the Commission are financially interested in their decisions and certainly cannot be said to be "independent." The acts complained of in this case are not the acts of the state but rather the acts of financially interested individuals. Such activity is not state supervision.

The decision in *MidCal* strongly supports this result. As noted above, this Court there held that:

> The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither es-

> tablishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. *The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.* As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' (emphasis added.)

445 U.S. at 105-106.

Furthermore "active supervision of the state itself" is not, as the lower courts assumed, merely active enforcement of the challenged program. The programs challenged in *MidCal, City of Lafayette, supra, Cantor* v. *Detroit Edison Company, supra,* and *Community Communications Company* v. *City of Boulder, supra,* were all actively enforced by the cities, boards and agencies involved, or else they never would have been challenged. Yet, in each instance, the challenged conduct was found not to be entitled to *Parker* exemption as there was a failure in each instance to show "active supervision by the state itself". Such a rule is logical. Otherwise, anyone who had injury by reason of illegal or unauthorized enforcement sufficient to show standing to bring such an action would immediately be blocked by the *Parker* exemption. This Court never intended such a result and the *MidCal* test would be meaningless if that were the rule to be applied. Indeed, there would have been no standing to challenge the program in the first place unless the program had been actively enforced against the individual bringing the action.

Thus, the lower courts' holding that the second prong has been satisfied merely due to the unauthorized activity

proved in the record of this action would lead to the inevitable conclusion that the very existence of a cause of action implies the satisfaction of *MidCal's* second prong. This interpretation would nullify the second prong of *MidCal* altogether if allowed to stand. Governmental and quasi-governmental entities composed, as here, of individuals with active special interests, should not be allowed to escape antitrust scrutiny simply because: (1) they have a general regulatory mandate; and (2) an action exists against them implying active enforcement in satisfaction of *MidCal*. The lower courts have incorrectly shielded the Commission and its members, with the very "gauzy cloak" that *MidCal* deemed insufficient.

Finally, it is not the active supervision of the below-cost statute of which FOR complains in this action. FOR instead complains that it has proven the unauthorized dissemination and exchange of proprietary price and cost information by the Commission, its members and staff, and the subsequent illegal stabilization of wholesale milk prices in the North Carolina milk industry, all in *per se* violation of Section 1 of the Sherman Act, and that it is *unable to obtain relief* from that violation. The exchanges permitted by the lower courts in this case are not only *not* part of the state's legislatively mandated policy to the Commission, but they are expressly forbidden by the confidentiality requirement of the Commission's own regulations.

FOR respectfully submits that the decisions of the lower courts are in error and should be reversed and judgment entered for FOR.

II.

THE FOURTH CIRCUIT'S DECISION APPLYING THE TWO PRONGS OF THE MIDCAL TEST CONFLICTS WITH HOLDINGS OF OTHER COURTS OF APPEALS.

A. The Fourth And Ninth Circuits Directly Conflict In Their Interpretation of the First Prong of the MidCal Test.

The Fourth Circuit, in this case, has created a conflict with the Ninth Circuit in its interpretation and application of the first prong of the *MidCal* test and in its application of the *Parker* exemption.

The Ninth Circuit strictly construes both prongs of *MidCal*. *Knudsen Corporation* v. *Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982) ("*Knudsen*") is the only federal circuit court of appeals opinion involving a discussion of the *Parker* exemption issue as it relates to the operation of a state dairy commission. In that case a manufacturer and distributor of dairy products challenged the Nevada Dairy Commission alleging that through that Commission, the state was mandating a price filing system promoting horizontal price fixing which restrained competition in the Nevada dairy market. The district court issued a preliminary injunction and the Court of Appeals affirmed. The Nevada Dairy Commission unconvincingly argued that there was a clearly stated and articulated Nevada policy to stabilize the prices of dairy products and that therefore it was entitled to the protection of *Parker*. Applying *MidCal*, the Ninth Circuit concluded that the Commission was not protected by *Parker*, reasoning that although the Nevada Dairy Commission is authorized by statute to do so, it does not set wholesale prices but simply enforces privately set prices through the mechanism of advance filing. Further, the court found that the public disclosure of cost and price documents, "appears also to inhibit and constrain price competition in the dairy industry."

In another recent Ninth Court case, *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983) ("*Title Insurance*"), the court held that the *first* prong of *MidCal* is not satisfied even where the state statute authorizes cooperative action in rate making. The statutory language in *Title Insurance*, although it listed factors to be considered in setting rates, was held to be insufficient to show a clearly articulated and affirmatively expressed state policy.

In contrast, the Fourth Circuit is substantially more liberal in interpreting the first prong of *MidCal*. As is evidenced by the decision of that court below, the Fourth Circuit expansively interprets the first prong of *MidCal* so as to extend the *Parker* exemption far beyond the protection contemplated by this Court in *Parker*. The Fourth Circuit requires virtually no showing in order to establish a clearly expressed and articulated policy for the first prong by protecting unauthorized and in fact prohibited conduct taken by the members and staff of the Commission from antitrust scrutiny.

In support of this holding, the lower court cites *Princeton Community Phone Book* v. *Bate*, 582 F.2d 706 (3d Cir. 1978), *a pre-MidCal decision*, stating that the policy of the state may be demonstrated by explicit language in the statutes *or* it may be *inferred* from the nature of the powers and duties conferred the agencies. However, the court of appeals below then liberalizes even this highly questionable *pre-MidCal* holding by concluding that since the acts complained of in this case were "incidental" to expressly authorized acts then they are to be protected whether they are prohibited by other statutory provisions or state policy or not. Therefore, the court avoids altogether the question of whether the specific conduct complained of in this case is protected by a state policy. It is difficult to imagine what conduct by any state agency or

its members or staff would not enjoy the benefits of the *Parker* exemption under this broad interpretation of *MidCal* adopted by the Fourth Circuit. This is especially true given that virtually all conceivable actions by such an agency or its members or staff could be deemed to be, in some way, "incidental" to expressly authorized actions.

The disagreement over the interpretation of the first prong of *MidCal,* from the strict interpretation of the Ninth Circuit to the very liberal interpretation by the Fourth Circuit (as is evidenced by this case), leads to inconsistency of application and therefore inconsistency of result. This inconsistency leads to uncertainty as to which actions are proscribed and which are not. This Court should grant certiorari to clarify the proper standards for application of the first prong of *MidCal.*

B. The Fourth Circuit's Decision In This Action Also Conflicts With the Ninth Circuits' View Of The Second Prong Of The MidCal Test.

MidCal also requires, before the state action exception may be applied, that the clearly articulated and affirmatively expressed state policy must be "actively supervised by the state itself". 445 U.S. at 105.

As with the first prong, the Fourth Circuit has staked out a position in conflict with that of the Ninth Circuit in articulating the standards to govern application of prong two of the *MidCal* test. The Ninth Circuit in *Miller* v. *Oregon Liquor Control Commission,* 688 F.2d 1222, 1226-27 (1982) required "pointed reexamination" by the state and "reviews of reasonableness" as to how the state policies are being effectuated in order for the active supervision requirement of *MidCal* to be met. Such an

interpretation is required by the clear language of *Mid-Cal*. The Ninth Circuit specifically held:

> The wholesalers and the commission argue that Oregon law, like Virginia law, completely controls the distribution of liquor within the state's boundaries and should therefore be immune from the Sherman Act under *Parker*. We disagree. The Oregon beer and wine pricing program resembles the California wine pricing program more closely than a liquor and wine pricing program in Virginia. Oregon 'neither establishes prices or reviews the reasonableness of the price schedules . . . [nor does it] monitor market conditions or engage in any "pointed reexamination" of the program.' *MidCal, supra*, 445 U.S. at 105-06, 100 S.Ct. at 943. Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission 'may reject any price posting which is in violation of any of its rules,' Rule 210(1)(b), the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. The similarities between the Oregon and California laws and the differences between the Oregon and Virginia laws indicate that Oregon, like California, does not meet the second prong of the two-prong *MidCal* test. Oregon merely authorizes and enforces the disputed pricing practices. *See MidCal, supra*, 445 U.S. at 105, 100 S.Ct. at 943. It does not ' "displace unfettered business freedom" with its own power.' (citation omitted.)

688 F.2d at 1226-1227. *See also, Knudsen, supra*.

Disagreeing with this Ninth Circuit interpretation of prong two of the *MidCal* test are the Sixth Circuit in the case *Gambrel* v. *Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1198 (1983) and the Fourth Circuit in its decision below.

In both instances, the courts assumed that mere active enforcement of the challenged program is "active supervision of the state itself." As outlined *supra*, at 23-4, under this liberal interpretation, the second prong of *MidCal* is nullified. Such a broad definition of active supervision is directly contrary to *MidCal*, substantially weakens the antitrust proscriptions of the Sherman Act and incorrectly expands *Parker* far beyond this Court's intent. Such inconsistency of interpretation and result must be clarified and this Court should grant certiorari in order to establish the proper standards to be applied.

CONCLUSION

Whether considered separately or cumulatively, the errors committed by the courts below are so egregious and so plain that the petition for writ of certiorari should be granted, the judgment of the court of appeals reversed and judgment should be entered for petitioner.

Respectfully submitted,

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**Counsel of Record*

July 11, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 1984, three copies of this Petition and Appendix were mailed, postage prepaid, to counsel for the respondent, W.C. Harris, Esq. and F. Stephen Glass, Esq., Harris, Cheshire, Leager & Southern, P. O. Box 2417, Raleigh, North Carolina 27602.

I further certify that all parties required to be served have been served.

JOHN F. SHERLOCK, III
Counsel For Petitioner,
Flav-O-Rich, Inc.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 83-2066

FLAV-O-RICH, INC.,
Appellant,
v.
NORTH CAROLINA MILK COMMISSION AND
ITS MEMBERS, HERBERT C. HAWTHORNE, VILA M.
ROSENFELD,
ANNA G. BUTLER, RUSSELL E. DAVENPORT
CHARLIE L. HARDEE, INEZ M. MYLES, B.F NESBITT,
KATHRYN G. KIRKPATRICK, AND DAVID A. SMITH,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. FRANKLIN T. DUPREE, JR., SENIOR DISTRICT JUDGE. (C/A 82-1172-CIV-5)

ARGUED APRIL 3, 1984 DECIDED APRIL 12, 1984

BEFORE WINTER, CHIEF JUDGE, WIDENER AND PHILLIPS, CIRCUIT JUDGES.

JOHN S. KECK (D. PAUL ALAGIA, JR., JOSEPH L. HAMILTON, BARNETT & ALAGIA; JERRY W. AMOS, REID L. PHILLIPS, BROOKS, PIERCE, McCLEN DON, HUMPHREY & LEONARD ON BRIEF) FOR APPELLANT; F. STEPHEN GLASS (W. C. HARRIS, JR., HARRIS, CHESHIRE, LEAGER & SOUTHERN ON BRIEF) FOR APPELLEES.

PER CURIAM:

Plaintiff sued the North Carolina Milk Commission praying a declaratory judgment and injunctive relief for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1. The action arose out of defendant's suspension of plaintiff's license to distribute milk in North Carolina as a result of plaintiff's refusal to make its records available in connection with an investigation of below-cost selling in violation of N.C.G.S. § 106-266.19. Plaintiff claimed, *inter alia*, that defendant disseminated confidential price information and stabilized prices in North Carolina in violation of the Sherman Act.

The district court granted summary judgment for defendant ruling that defendant had violated § 1 of the Sherman Act but that defendant and its activities were exempt from antitrust scrutiny under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. We agree.

We affirm the judgment of the district court for the reasons set forth in its memorandum of decision. *Flav-O-Rich, Inc.* v. *North Carolina Milk Commission*, No. 82-1172-Civ.-5, E.D.N.C., October 27, 1983 (unpublished).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 82-1172-CIV-5

FLAV-O-RICH, INC.,
Plaintiff,
v.
NORTH CAROLINA MILK COMMISSION AND
ITS MEMBERS, ETC.,
Defendants.

MEMORANDUM OF DECISION

Plaintiff, Flav-O-Rich, Inc., a milk processor-distributor, brought this action against the North Carolina Milk Commission and its members for declaratory and injunctive relief for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1]

The action is before the court on the parties' cross-motions for summary judgment. After hearing arguments on the motions and considering the submissions of the parties, the court is of opinion that although the question is a close one, that plaintiff's motion should be denied and defendants' motion granted.

On November 10, 1981, auditors from the Milk Commission requested Flav-O-Rich's Durham Division Office to disclose information on cost and prices for certain

[1] Plaintiff also alleged due process violations under 42 U.S.C. § 1983. Inasmuch as these claims were neither argued nor briefed by plaintiff in its motion for summary judgment, the court will treat them as waived. In addition the court finds that the disclosure requirement is rationally related to a legitimate state purpose. Thus this claim must be dismissed as without merit.

wholesale accounts. The information requested was to be used in connection with an investigation of below-cost selling in violation of N.C.G.S. § 106-266.19. Flav-O-Rich denied the auditors access to this information. On December 8, 1981 and May 3, 1982, the auditors again requested and were refused the information.

After giving plaintiff notice that it should appear and show cause why its license should not be revoked for refusing to make the records available, the Milk Commission, on May 25, 1982, conducted a hearing. At the hearing, Flav-O-Rich did not offer evidence opting instead to read a statement concerning the importance of confidential cost and price information. As a result of the hearing, the Milk Commission, on October 12, 1982, ordered that effective November 12 of that year the license of Flav-O-Rich, Inc., Durham Division, to distribute milk in North Carolina would be suspended. Plaintiff then brought this action seeking injunctive and declaratory relief. On November 5, 1982, the court granted plaintiff's motion for a preliminary injunction.

Although other issues are raised in the record the principal issue presented by these motions is whether the requirement by the North Carolina Milk Commission that Flav-O-Rich permit inspection of its records which results in an exchange of price information is exempt from the Sherman Act under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). When addressing the "state action" doctrine, the threshold issue of whether the activity violates the Sherman Act must be resolved. *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In this instance, Flav-O-Rich is complaining of an exchange of price information which leads to price stabilization in violation of Section 1 of the Sherman Act. *United States* v. *Container Corporation*, 393 U.S. 333 (1969). In *Container Corpora-*

tion there was an exchange of specific sales and price information of identified customers. The court held that where the industry was dominated by relatively few sellers, the product is fungible, competition for sales is primarily through price and demand is inelastic, such that buyers place orders only for short term needs, the exchange tends toward price uniformity and is therefore illegal *per se*.

Plaintiff's exhibits clearly document exchanges of price information. Moreover, the milk industry in North Carolina is characterized by a small number of sellers and a large number of buyers. There is little perceptible difference between brands of milk and the primary means of competition among processor-distributors is aggressive pricing. Although small or moderate fluctuations in price do not have a significant effect on the volume of milk and dairy products sold, competition through price is only significant to the extent that an individual seller may increase its share of the market by taking customers away from its competitors. With the obvious short-term life span of milk, orders are, by necessity, placed on the basis of short-term needs. Under these circumstances, the court agrees with plaintiff that price exchanges would result in price stability in violation of *United States* v. *Container Corporation, supra*.

Having satisfied the initial requirement that the complained of activity violates the antitrust laws, the issue of whether the actions of the North Carolina Milk Commission are immune from the antitrust laws under the "state action" doctrine must be decided.[2]

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[2] Plaintiff has argued that this court's prior memorandum of decision accompanying the preliminary injunction forecloses consideration of this issue. This argument, however, misperceives the inquiry when a preliminary injunction is before the court. At that stage, the

In *Parker* v. *Brown*, the Supreme Court held that the federal antitrust laws did not prohibit a state, in the exercise of its sovereign powers, from imposing certain anti-competitive restraints. *Community Communications Company* v. *City of Boulder*, 455 U.S. 40 (1982). Cases interpreting the *Parker* v. *Brown* doctrine reveal that unless the activity is an act of the state, done in its sovereign capacity, or is that of a state agency under a clearly articulated and affirmatively expressed policy, *e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. at 105, the exemption is inapplicable. *Community Communications Company* v. *City of Boulder*, 455 U.S. at 52.

Defendants contend that because the Commission is an instrumentality of the state, N.C.G.S. § 106-266.8, the state was acting in its sovereign capacity and therefore immune from antitrust liability. Thus it is argued that the two-pronged *Midcal* analysis is unnecessary. *See, e.g., Deak-Perera Hawaii* v. *Department of Transportation*, 553 F.Supp. 976 (Hawaii 1983). It is not the status of a defendant as an agency, however, which entitles it to the exemption. *City of Lafayette* v. *Louisiana Power & Light Company*, 435 U.S. 389 (1978). In *Deak*, for example, the defendant was the state department of transportation. Because the state can act only through its agents, the action of the state transportation department can be considered an act of the state itself. In contrast, defendant is a regulatory commission which acts much like the agency in *Midcal*. Accordingly, the two-pronged test is appropriate.

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court need only inquire whether serious questions of law are at issue. *Blackwelder Furniture Company* v. *Seilig Manufacturing Company*, 550 F.2d 189 (4th Cir. 1977). The decision was not, as plaintiff's argument presumes, a decision on the merits of the antitrust claim for relief.

Under the *Midcal* test, defendants must show first that the challenged activity is clearly articulated in affirmatively expressed state policy. To meet this test all that must be shown is that the agency is carrying out the mandate of the state. *City of Lafayette* v. *Louisiana Power & Light Company, supra* (Brennan, J., concurring). It may be derived "from the authority given a governmental entity to operate in a particular area. . . ." *Id.* at 415 (Brennan, J., concurring) (quoting the lower court opinion, 532 F.2d at 434). In addition, the mandate may be demonstrated by explicit language in the statutes or it may be inferred from the nature of the powers and duties conferred the agency. *Princeton Community Phone Book, Inc.* v. *Bate,* 582 F.2d 706 (3d Cir.), *cert. denied,* 439 U.S. 966 (1978).

"[T]he purpose of the act creating the Milk Commission was to protect the public interest in a sufficient, regularly flowing supply of wholesome milk and, to that end, to provide a fair price to the milk producer for his product." *North Carolina ex rel. North Carolina Milk Commission* v. *National Food Stores, Inc.,* 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). To carry out its mission, the Commission was given the power to examine records and require their production. N.C.G.S. § 106-266.8(5). To this end, the subpoena power could be invoked if necessary. *Id.* In addition, the legislature made it unlawful for anyone to sell milk below cost, N.C.G.S. § 106-266.19, and gave the Commission the power to investigate all matters pertaining to the production, processing, storage, distribution and sale of milk. N.C.G.S. § 106-266.8(2). The Commission also may act as mediator concerning controversial issues that may arise among or between producers or distributors. N.C.G.S. § 106-266.8(4). From these grants of power it is clear that the incidental exchange of price information of which plaintiff

complains falls within the affirmatively expressed and articulated state policy.

This is further evidenced by the acts of which plaintiff complains. Plaintiff asserts five areas in which price and cost exchanges occurred. Each instance, however, was a natural, consequence of the Commission carrying out explicit powers. For example, Flav-O-Rich complains that price and cost exchanges occurred because of direct contact between Commission members and processors. This occurs when processors inform the Commission that a competitor is believed to be charging below cost in violation of N.C.G.S. § 106-266.19. The Commission then begins an investigation in the area, N.C.G.S. § 106-266.8(2), and may later inform the complaining processor that the price is or is not below cost, or that there has been an adjustment, and the complainant must either meet the new cost or not charge below its cost. Thus the exchange occurs as a direct result of the investigation and the attempts to prevent below-cost sales in violation of the statute. Otherwise, continued below-cost sales would result in ruinous competition and threaten an orderly milk market, results the statute was explicitly designed to correct. *See* 1953 N.C. Sess. Laws Chapter 1338.

The second example of an exchange occurs at public hearings to determine if below-cost pricing in violation of N.C.G.S. § 106-266.19 has occurred. At the hearing, cost and price figures surely become exposed. However these hearings are expressly contemplated by the state, *id.*, and certainly such evidence must be explored to determine if below-cost sales have occurred. That the information in some sense becomes "exchanged" is only incidental to the procedure employed by the state to investigate below-cost pricing.

Thirdly, Flav-O-Rich complains of processors meeting with the Commission to discuss pricing. These meetings, however, are affirmatively authorized by the legislature. N.C.G.S. § 106-266.8(4). Additionally, the Commission has the power to set maximum and minimum retail and wholesale prices charged for milk. N.C.G.S. § 106.266.8(10)(b). This may occur after investigations and hearings have been conducted. *Id.* Meeting with processors to discuss this alternative and others which may stabilize the industry is certainly within the legislative mandate.

Fourth, plaintiff complains that because the Commission has two processors as members, whenever price or cost is discussed, an exchange occurs. However, N.C.G.S. § 106-266.7(a) requires the Speaker of the House to appoint two members to the Commission, one of whom must be a processor. The Commission of Agriculture, who appoints three members, must likewise appoint one who is a processor. *Id.* That they would be privy to Commission information could not be more expected.

The last example of information exchanging occurs through the media. While there is no statutory requirement that information be given to the press, the below-cost hearings are public and the press may freely attend. Moreover, it is not every exchange of information which constitutes a Sherman Act violation. *United States* v. *United States Gypsum Company*, 438 U.S. 422 (1978). It is doubtful that the occasional dissemination of information through the media constitutes a Sherman Act violation.

To summarize, the totality of the exchanges of price information of which plaintiff complains would normally amount to a violation of Section 1 of the Sherman Act. Yet, a review of the legislative mandate of the Milk

Commission discloses that these exchanges were authorized by the legislature as a clearly articulated and affirmatively expressed policy of the state. The exchanges occur as a natural result of the Commission's carrying out the very specific mandate to prevent below-cost pricing and investigate where it occurs. The Commission is also to investigate methods of maintaining stable markets and may fix wholesale and retail prices. Price information exchanges in this context clearly meet the first prong of the *Midcal* test.

The second prong of the test is also met. Not only is the Milk Commission to hold regular meetings, N.C.G.S. § 106-266.8(j), but the very active supervision of the below-cost statute with its consequent flow of price and cost information is the essence of this litigation. This supervision clearly meets the second prong of the test.

Accordingly, the "state action" doctrine of *Parker* v. *Brown* constitutes a defense to the action and the Commission's motion for summary judgment must therefore be granted and Flav-O-Rich's motion for summary judgment must be denied. An appropriate judgment shall be entered.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 27, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 82-1172-CIV-5

FLAV-O-RICH, INC.,

Plaintiff,

v.

NORTH CAROLINA MILK COMMISSION AND
ITS MEMBERS, ETC.,

Defendants.

JUDGMENT

For the reasons stated in this court's memorandum of decision filed this day it is hereby

ORDERED that defendants' motion for summary judgment is granted, plaintiff's motion for summary judgment is denied and this action is dismissed.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 27, 1983.

No. 84-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLAV-O-RICH, INC.,

Petitioner,

v.

NORTH CAROLINA MILK COMMISSION,
HERBERT C. HAWTHORNE, VILA M. ROSENFIELD, ANNA G. BUTLER, RUSSELL E. DAVENPORT, CHARLIE L. HARDEE, INEZ M. MYLES, B. F. NESBITT, KATHRYN G. KIRKPATRICK AND DAVID A. SMITH,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Courts below erred in holding that the state action doctrine, as announced by this Court in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) ("*Parker*") and *California Retail Dealers Association* v. *Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) ("*Midcal*"), exempts the North Carolina Milk Commission from challenge under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980)?

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents, the North Carolina Milk Commission and its Members ("Commission"), pray that the Petition of Flav-O-Rich, Inc. ("F-O-R") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-referenced case on April 12, 1984 be denied.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit was filed on April 12, 1984, No. 83-2066. The opinion and judgment of the United States District Court for the Eastern District of North Carolina were

entered October 27, 1983, No. 82-1172-CIV-5, but are not yet reported. The opinions are reproduced in the Appendix to the F-O-R Petition.

STATUTORY PROVISIONS INVOLVED

The question presented by this case involves the applicability of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980), to the activities of the Commission, in light of its mandate found in North Carolina General Statutes § 106-266.6 *et seq.*

STATEMENT OF THE CASE

A. Nature Of The Case

This case is not, as F-O-R asserts, about the Commission acting with the purpose of restraining competition in the milk industry through practices of disseminating price and cost information. It is not about the Commission attempting to stabilize wholesale milk prices. Rather, the case is about the Commission's attempt to enforce the mandate of the North Carolina General Assembly ("General Assembly") to prohibit the sale of milk by a giant processor/distributor below cost for the purpose of injuring, harassing or destroying competition.

In 1953, the General Assembly determined that a constantly available uniform and adequate supply of wholesome milk and other milk products is necessary for the citizens of the State. After making additional findings, the General Assembly concluded that it is necessary for the safety, health and welfare of the people that the milk industry be subject to some governmental regulations in order to suppress unfair, unjust and destructive trade practices that were being carried on in the milk industry. The General Assembly further found that the marketing of milk was subject to a great deal of fluctuation in price as

well as to destructive and dangerous practices which result in the destruction of competitors. These and other findings, expressed in the Preamble to S.B. 263, Ch. 1338, 1953 North Carolina Session Laws, led the General Assembly to the passage of the North Carolina Milk Commission Law of 1953.

In rewriting the Milk Commission Law in 1971, the General Assembly made a number of similar findings in the Preamble to S.B. 643, Chapter 779 of the North Carolina Session Laws of 1971, observing that the milk industry is a business affecting the public health and interest, and again found that it is necessary for the safety, health and welfare of the people that the milk industry be subject to some governmental regulations. The General Assembly further found that it is necessary to suppress unfair, unjust and destructive trade practices in the production, marketing and distribution of milk to avoid the creation of hazardous and dangerous conditions with reference to the health and welfare of the people of the State. Specifically, the Assembly pointed to the "unfair and ruinous" competitive practice of selling milk below cost.

With the foregoing considerations in mind, the 1971 General Assembly enacted Article 28(B) of Chapter 106 of the North Carolina General Statutes ("North Carolina Milk Commission Law," hereinafter, "Milk Law"). The preamble to the current[1] as well as the former[2] Milk Law fully articulates the state policy and purpose of the milk regulations.

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[1] Preamble to S.B. 643, Chapter 779 of North Carolina Session Laws, 1971.

[2] Preamble to S.B. 263, Chapter 1338 of North Carolina Session Laws, 1953.

The Milk Law is administered by the Commission pursuant to N.C.G.S. §§ 106-266.6 through 106-266.19 as a part of the North Carolina Department of Commerce (N.C.G.S. § 106-266.7). The Commission is composed of ten members, three of whom are appointed by the Governor; two of whom are appointed by the Lieutenant Governor; two of whom are appointed by the Speaker of the House of Representatives; and three of whom are appointed by the North Carolina Commissioner of Agriculture. *Id.*

The General Assembly has given the Commission the following mandate:

> The Commission shall, subject to the limitations herein contained and the Rules and Regulations of the Commission, enforce the provisions of this Article. . . .
>
> (N.C.G.S. § 106-266.7[i])

The powers of the Commission are stated in the preamble to N.C.G.S. § 106.266.8 which states "*the Commission is hereby declared to be an instrumentality of the State of North Carolina,* vested with power. . . ." (Emphasis added.) Among those enumerated powers are the following: to investigate all matters pertaining to the production, processing, storage, distribution and sale of milk in North Carolina; to supervise and regulate the transportation, storage, distribution, delivery, and sale of milk; to examine the business, books, and accounts of any milk producer, association of producers or distributors; to issue subpoenas to milk producers, associations of producers, and milk distributors, and require them to produce their records, books, and accounts; to subpoena any other person from whom information is desired; to take depositions; to make, adopt and enforce all rules, regulations, and orders necessary to carry out

the purposes of the Milk Law; to hold public hearings and fix prices to be paid producers and/or associations of producers and fix prices for different grades or classes of milk, or fix the maximum and minimum wholesale and retail prices to be charged for milk, and adopt a formula incorporating various enumerated economic factors relevant to the production of milk; to establish prices to be paid producers or associations of producers; and to license distributors and sub-distributors.

Further, the Milk Law permits the Commission to apply to any court of record for injunctive relief in the event of violation of the Article without being compelled to allege or prove that an adequate remedy at law does not exist. The statutes further provide that any person aggrieved by an order of the Commission revoking or suspending a license of a distributor or producer/distributor may have such order reviewed by appeal to the Superior Court. Specifically, N.C.G.S. § 106-266.19 prohibits the sale of milk by any distributor or producer/distributor or retailer below cost for the purpose of injuring, harassing or destroying competition (hereinafter "below cost").

Pursuant to its responsibilities under the Milk Law, the Commission actively investigates and reviews, *inter alia*, complaints of alleged violations of the below-cost sales statute. The investigative and review steps taken by the Commission and its staff with regard to such a complaint are:

(1) The investigation originates with a complaint of a processor/distributor which encounters a price of a competitor which it believes to be below that competitor's cost. The Complaint may be by telephone or in writing, and may be in the form of a letter notifying the Commission that the complainant processor is meeting the

price of a competitor which it believes to be below the competitor's cost and below his cost.

In either situation, the Commission would not commence a below-cost investigation unless the complaining processor first informed the Commission of the price of the competitor which it believed to be below that competitor's cost.

In the case of a school or institutional account, the Commission staff would review the filings of prices bid.

(2) The Commission staff, upon receipt of this information, begins an investigation which may include acquiring information from the retailer regarding the price at which it is purchasing from the named competitor, and/or an examination of the competitor's records to determine if the price at which it is selling to that buyer is, in fact, below that competitor's cost.

(3) At the completion of its investigation, the Commission staff will notify the complainant as to whether the sale complained of was in fact below cost or not and whether the complainant may lawfully meet that cost at the reported price. If the price was not found to be below the competitor's cost, the complainant will be so advised. The price found by the Commission is not revealed to the complainant if different from the price it initially reported.

(4) If the investigation reveals that the price was below cost, the Commission staff may cite the distributor or processor/distributor for a hearing before the Commission to determine if, in fact, a violation of the below cost sales statute has occurred, and if so, the Commission will take appropriate action.

(5) Only prices found to be below cost are contained in the letter citing a processor to appear before the Commission. Prices contained in the citation

letter and which are the subject of the Commission hearing are as F-O-R alleges subject to publication by the media when the violation is prosecuted in a public hearing.

B. Procedural History

In accordance with its previously described authority, the Commission, on 25 May 1982, conducted a hearing pursuant to notice to F-O-R dated 5 February 1982 and 5 May 1982 notifying F-O-R, a licensee of the Commission, to appear and to show cause why its license should not be revoked or why other appropriate action should not be taken for its refusal to make records available to representatives of the Commission as authorized by N.C.G.S. § 106.266.8 during a "below-cost" investigation pursuant to N.C.G.S. § 106-266.19. On 12 October 1982 the Commission made its findings and concluded that on 10 November 1981, 8 December 1981, and 3 May 1982, duly authorized representatives of the Commission requested records of F-O-R as authorized by statute, and that the general manager of F-O-R refused to make such records available to the representatives of the Commission. The Commission then issued an order effective 12 November 1982 suspending the license of F-O-R to distribute milk in North Carolina, but providing that the Commission would accept from F-O-R an offer in compromise of $5,000.00 as a penalty in lieu of such suspension, and upon payment of said sum the Commission would rescind the suspension of F-O-R's license.

F-O-R then brought this action seeking injunctive and declaratory relief. On 5 Nobember 1982, the District Court granted F-O-R's motion for a preliminary injunction. After extensive discovery, both F-O-R and the Commission filed cross-motions for summary judgment. The District Court denied F-O-R's motion and granted

the Commission's motion, from which F-O-R appealed. On appeal, the Court of Appeals affirmed the District Court in an unpublished *per curiam* opinion issued on 12 April 1984, (Petitioner's App. at 1a), referring to the reasoning and conclusions of the District Court.

REASONS FOR DENYING THE WRIT

There are no special or important reasons which would call for the Court to issue a writ of certiorari. The courts below did not err in applying the standards of *Parker*. Supreme Court Rule 17.1(c). Nor is the decision of the Fourth Circuit in conflict with the decisions of the Ninth Circuit "on the same matter." Supreme Court Rule 17.1(a).

I.

The Commissions's Action In Enforcing The State's Statute Prohibiting Sales Below Cost Is Itself Action By The State Which Invokes The State Action Immunity Of *Parker*.

The Commission argued at both stages below that its action in enforcing the state's statute prohibiting sales of milk below cost was the same as the state itself acting thus entitling the Commission to state action immunity. This contention was based upon the status of the challenged activity in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L. Ed. 2d 572 (1975), and *Bates* v. *Arizona State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed. 2d 810 (1977), *inter alia*. In light of this Court's recent decision in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. ___, 80 L. Ed. 2d. 580 (1984), the Commission renews this contention.

This Court in *Hoover* held that the *Parker* state action antitrust immunity covered a committee of a state supreme court which administered and graded bar exami-

nations. The Court in *Hoover* analyzed the *Parker* decision and its progeny, including *Goldfarb; Bates; Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L. Ed. 2d 1142 (1976); *Lafayette* v. *Louisiana Power and Light Company*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed 2d 364 (1978); and *Midcal*, and concluded that

> When the conduct is that of the sovereign itself, . . . the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."
>
> 80 L.Ed. 2d at 600.

With regard to its action challenged by F-O-R, the Commission was acting as "the state" rather than some independent "political subdivision." *Deak-Perera Hawaii* v. *Department of Transportation*, 553 F. Supp. 976 (D. Hawaii, 1983). See also, *Wainwright* v. *National Dairy Products*, 304 F. Supp. 567, 574 (N.D. Georgia, 1969).

The Commission is legally an instrumentality of the State of North Carolina. It has been expressly declared so by the General Assembly, N.C.G.S. § 106-266.8, and vested with certain enumerated powers including those challenged by F-O-R [the enforcement of the prohibition against sales of milk "below cost," N.C.G.S. § 106-266.19, and the authority to examine records of processors in the course of such investigation, N.C.G.S. § 106-266.8(12)]. See also: *In Re Arcadia Dairy Farms, Inc.* 289 N.C. 456, 464, 223 S.E.2d 323 (1976); *Milk Commission* v. *Galloway*, 249 N.C. 658, 107 S.E.2d 631 (1959); *Milk Commission* v. *Food Stores*, 270 N.C. 323, 154 S.E.2d 548 (1967).

For the purposes of this case, it is manifest that the Commission has been charged with the responsibility of enforcing the state's policy prohibiting the sale of milk

below cost. The Commission, therefore, acts as the state in matters concerning the enforcement of the state's policy. See, *Milk Commission* v. *Galloway*, 249 N.C. at 667-668. The examination of F-O-R's business records is a necessary element in enforcing that policy. The state, through its courts, will provide injunctive relief in the event of a violation of the Milk Law Statutes, or an "order promulgated under the provisions thereof." G.S. § 106-226.13.

The Commission respectfully contends that when the Commission acts to enforce the state's policy, it is the same as the State of North Carolina acting. As in *Hoover*, the actions of the Commission cannot be divorced from the legislature's exercise of its sovereign powers. *Hoover* at 601.

This Court in *Hoover* went on to say that when the activity at issue is not directly that of the state, but is carried out by others pursuant to state authorization, closer analysis is required to ensure that the anticompetitive conduct of the state's representative was contemplated by the state, *Id.* at 599, and the degree to which the state supervises its representative is relevant to that analysis. *Id.* at 600. In the case at bar the lower courts applied the *Midcal* test, correctly concluding that the Commission's challenged activity (below cost enforcement) satisfied both prongs of that test. It is not inconsistent for the Commission to say, especially since *Hoover*, that the Commission's challenged activity is tantamount to activity of the state itself in enforcing the below-cost statute.

II.

The Courts Below Correctly Applied This Court's Decisions Defining The Scope Of The State Action Exemption To The Sherman Act.

This Court's decision in *Parker* is the genesis of any analysis of the state action exemption. In *Parker*, the Court considered the antitrust implications of a California statute that maintained prices and restricted competition among raisin growers through a state commission. This Court, in *Parker*, observed that Congress did not intend to prohibit state action regulating economic activity when it enacted the Sherman Antitrust Act:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. *It is the state which has created the machinery for establishing the prorate program.* Although the organization of a prorate program, approved by the Commission, must also be approved by referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval of the program upon the referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulations and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. (Emphasis added/,
>
> 317 U.S. at 352, 63 S.Ct. at 314 (citations omitted.)

In the years since *Parker*, this Court has had occasion in several cases to determine the scope of state action immunity. One of those was *Goldfarb*, relied upon at

every stage by F-O-R. *Goldfarb*, holding that the State Bar was not exempt from the Sherman Act in requiring lawyers to adhere to minimum fee schedules is clearly distinguishable from the case *sub judice*.

In *Goldfarb*, the Court focused upon the relationship between the defendant and the state and the activities of the defendant, with emphasis on the extent to which the challenged activity was controlled by state law. The status of the *Goldfarb* defendants differs from that of the Commission. In *Goldfarb*, the defendant was the Virginia State Bar, an independent association consisting of all lawyers admitted to practice in Virginia. The Virginia Supreme Court made the State Bar an agency of the state for "some limited purposes," *Goldfarb*, *supra* at 791, 95 S.Ct. 2004, of regulating the practice of law in that state. The members of the State Bar were not appointed by the Virgina Supreme Court Justices, or by any other state officials, as agents of the state. In contrast, the members of the Commission are appointed by state officials, N.C.G.S. § 106-266.7, and the Commission is declared "to be an instrumentality of the State of North Carolina," vested with certain powers enumerated in N.C.G.S. § 106-226.8.

Another focal point of *Goldfarb* also demonstrates its inapplicability here. In *Goldfarb*, the State Bar enforced minimum fee schedules despite the fact that there was no Virginia statute or Supreme Court rule authorizing the State Bar to maintain such minimum fees. See *Hoover*, note 32 at 606.

Such is not the case here, because as N.C.G.S. §§ 106-266.6 through 106-266.19 explicitly articulate the intention of the legislature to regulate the state's milk industry, and, in particular, to prohibit the sale of milk at below cost.

This Court again dealt with the state action immunity issue in *Bates* v. *Arizona State Bar, supra,* which unanimously held that the State Bar of Arizona, enforcing a prohibition of lawyers advertising, was exempt from the Sherman Act. The Court found that the association in *Bates* was enforcing a clear command of the State pursuant to the Airzona Supreme Court rules prohibiting advertising. The Court stated:

> Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the Court; the appellee acts as the agent of the Court under its continuous supervision.
>
> *Id.* at 361, 97 S.Ct. at 2697.

The Commission, in its activities *sub judice*, was likewise enforcing a clear command of the State pursuant to the statute prohibiting sales of milk below cost.

From *Parker* evolved the two-prong test of *Midcal* requiring that before being clothed with state action immunity, a challenged activity must show:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself.
>
> *Id.* at 105, 100 S.Ct. at 943.

A. The Lower Courts Correctly Held That The Activity Of The Commission At Issue Met The First Part Of The Two-prong *Midcal* Test.

The challenged activity of the Commission resulted from a policy of the state clearly articulated and affirmatively expressed in the Milk Law. The preambles, *supra*, both to the present as well as the former Milk Law, clearly state the purpose of the Milk Law. The General Assembly in enacting the Milk Law articulated

and affirmatively declared the state policy required to achieve that purpose. A summary of the enforcement provisions of the statute is found *supra* at 4, *et seq*. The records examination provision of which F-O-R complains is one of those provisions and is necessary to the enforcement of the below-cost statute.

The North Carolina state courts have quoted from the Preamble to the Milk Law as a statement of state policy. *Milk Commission* v. *Galloway*, 249 N.C. at 664. The North Carolina state courts have also addressed the public policy behind the mandated enforcement measures in *Milk Commission* v. *Food Stores*, 270 N.C. at 335:

> The public interest sought to be protected by G.S 106-226.21 (now embodied in 106-266.19) is the public's interest in the regular flow of an adequate supply of wholesome milk from the producer to the consumer. . . .

Further, in *Milk Commission* v. *Galloway*, the court observed:

> Other facts in the preamble, as well as the Act itself, make it plain that the General Assembly was also concerned with suppressing unfair and destructive trade practices, and with stabilizing the milk industry, so as to enable the producers to secure a fair price for their milk. These recitals in the preamble set the framework for the legislation.
>
> 249 N.C. at 664.

Later at page 666, the court in *Galloway* reviewed the legislative grant of powers to the Commission:

> G.S. 106-266.8(c) gives to the State Milk Commission the specific power to supervise and regulate almost the entire milk industry, including the transportation of milk for consumption. G.S. 106-266.8(j) gives to the Milk Commission express power, after public hearing and investigation, to fix prices to be paid

> producers of milk by distributors, and establishes sufficient standards for its guidance by setting forth in the statute a reasonably clear formula to govern the Milk Commission in determining the reasonableness of the prices to be paid to the producers of milk by the distributors. This leaves to the Milk Commission its proper administrative function. There is a sedulous protection against abuse of power by the Milk Commission provided in G.S. 106-266.17, which requires that when an appeal is taken from an order of the Milk Commission, the proceeding shall be heard *de novo* in the Superior Court. If the Milk Commission should not have the power to regulate and to fix transportation rates for the distributor hauling milk of the producers to the processing plant, as the Trial Court aptly said in its judgment, "the delegation of the power to the Milk Commission to fix prices to be paid producers by distributors would be meaningless, inasmuch as a distributor by unreasonable hauling charges could prevent the producer (sic) from receiving reasonable compensation for his milk." In view of the very broad powers conferred upon the Milk Commission by G.S. 106-266(g) to hold hearings, make and adopt rules and regulations and orders necessary to carry out the purposes of the Act, we hold that the Milk Commision and the Superior Court on appeal, had the power, fairly implied from the language of the Act and essential to putting into effect its declared purposes and objects, to regulate and to fix transportation rates for distributors in North Carolina hauling milk of their producers in North Carolina to their processing plant in North Carolina—all intrastate business—and that sufficient standards for their guidance in regulating and fixing such hauling prices is to be fairly implied from G.S. 106-266.8(j).

Judge Dupree, at 7-8 of the District Court's opinion, observed that "From these grants of power it is clear that the incidental exchange of price information of which plaintiff [F-O-R] complains falls within the affirmatively expressed and articulated state policy."

The District Court at 8 held that a review of the legislative mandate of the Milk Commission discloses that the questioned actions of the Commission "were authorized by the legislature as a clearly articulated and affirmatively expressed policy of the state." The Commission's actions occur, the court found, "as a natural result of the Commission's carrying out the very specific mandate to prevent below-cost pricing and investigate where it occurs."

The Commission contends that since the legislature's intention to regulate the state's milk industry within North Carolina is articulated in the form of a very specific statutory authorization or mandate, the Commission's activity in enforcing the Milk Law is protected by the state action immunity.

F-O-R contends N.C.G.S. § 106-266.8(12) and N.C.G.S. § 106-258 specifically prohibit the disclosure of price and cost information in the course of enforcing the statutory prohibition against sales of milk below cost. This contention is based on an erroneous reading of the two statutes.

With regard to N.C.G.S. § 106-266.8(12), the last sentence of that subsection says, "The Commission may combine such information for any market or markets and make it public." The Commission does, in fact, combine such information with other such information for a given milk market or markets when publishing its reports (e.g., *Updated Summary of Costs of Processing, Distributing and Selling Milk in North Carolina*, a periodic report). To argue as F-O-R does that this statute mandates that the Commission combine the information regarding the below-cost violation obtained in records examination with information from any market is sheer folly. It would be impossible to prosecute any below-cost violation if

combining information were required for that purpose. Neither the Commission nor the accused processor would know whether a violation of the below-cost statute occurred if the evidence were so combined. Certainly, the accused processor would raise a due process question if it could not ascertain the specifics of the allegation against it.

F-O-R's contention regarding N.C.G.S. § 106-258 is incredible, and mirrors the absence of merit in its argument. It is as if F-O-R does not expect this Court to examine the statute. N.C.G.S. § 106-258 is part of Article 27, Chapter 106 of the General Statutes of North Carolina, which pertains to the State *Department of Agriculture* and the *Commissioner of Agriculture*. The Milk Commission is part of the North Carolina Department of *Commerce*, N.C.G.S. § 106-266.7(a), not the Department of Agriculture.

The presentation of N.C.G.S. § 106-258 on page 10 of the F-O-R petition is a distortion of the truth, and casts a shadow on the F-O-R argument based thereon.

Further, F-O-R would have this Court believe that it proved and the District Court found that price information has been repeatedly and continuously exchanged and that the exchange was "unlimited." The truth, however, is found on pages 8-9 of the District Court's opinion where the court discussed five areas in which price and cost exchanges occurred. The court, there, found that "each instance, however, was a natural consequence of the Commission carrying out explicit powers." Memorandum of Decision at 8. Speaking to the second example of an exchange (public hearings[3]), the court said, "That the

---

[3] In the course of enforcing the below-cost statute, accused violators are prosecuted. The accused processor has certain Con-

information is in some sense 'exchanged' is only incidental to the procedure employed by the state to investigate below-cost pricing." *Id.*

At page 10, the District Court concludes that the "exchanges occur as a natural result of the Commission's carrying out the very specific mandate to prevent below-cost pricing and investigate where it occurs." The Commission contends that the judgment of the lower courts should be affirmed as its actions were, as Judge Dupree found, "authorized by the legislature as a clearly articulated and affirmatively expressed policy of the state." *Id.* at 10.

B. The Lower Courts Correctly Held That The Activity At Issue In This Action Met The Second Part Of The Two-prong *Midcal* Test.

The reason the lower courts analyzed the second prong of the *Midcal* test only briefly is that the Commission's compliance is so clear.

The "active supervision" of the Milk Law by the state is the very reason F-O-R sought injunctive relief. Since the Commission is a state agency or instrumentality whose very composition is periodically subject to review in the General Assembly and in the appointment process,

stitutional due process rights at a Commission hearing, among them the right of confrontation and the right to a public hearing. As an incident to such prosecution, the price/cost information must be presented in order for the Commission to make a decision and to comply with the accused processor's constitutional due process rights. The Appellant's twisting of Judge Dupree's use of the term "incidental," Memorandum of Decision, at 6, must be seen in this light. Certainly, the legislature contemplated that a processor accused of violating the below-cost statute would be accorded these constitutional rights during the prosecution of such an alleged violation.

N.C.G.S. § 106-266.7, and its actions are subject to judicial review *de novo*, N.C.G.S. § 106-266.15, it is abundantly clear that the actions of the Commission are subjected to "pointed re-examination" by the state. One could hardly imagine how the *Midcal* analysis could fail to be satisfied in the case *sub judice* in that the state is merely acting through its instrumentality, the Commission, which actively supervises the state's clearly articulated and affirmatively expressed policy of prohibiting violations of N.C.G.S. § 106-266.19 (below-cost sales).

If F-O-R were correct in its literal contention that *Midcal* specifically requires the state's policy to be "actively supervised by the state itself," then only the Legislature (or Supreme Court, or Governor) would be accorded state action immunity. Of course, that has neither been the holding nor result of any case cited by F-O-R or any case known to the Respondents.

In addressing the state's involvement in *Midcal*, this Court turned to *Parker*, noting that the *Parker* Court emphasized that inasmuch as the State Agricultural Prorate Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: "*It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . .*" (Emphasis added.). 445 U.S. at 942, quoting 317 U.S. at 352.

F-O-R's contention would thus deny the state action immunity to the facts in Parker since it was a state commission there whose activity was challenged.

F-O-R relies upon *Goldfarb* at page 17 of its Petition to argue that the Respondents have failed to satisfy the second prong of the *Midcal* test. As previously argued in

this brief, the facts of *Goldfarb* are distinguishable from the case at bar on both prongs of the *Midcal* test and lead to a different result. However, the rule announced in *Goldfarb* is sound: in order for state action immunity to apply, the challenged activities "must be compelled by direction of the State acting as a sovereign." 445 U.S. at 105 quoting 421 U.S. at 791. While *Goldfarb* did not satisfy this requirement, in the case *sub judice* the Commission's activity (below-cost enforcement) is compelled by the state in N.C.G.S. § 106-266.19.

At page 16, F-O-R argues that "*at least* half" (emphasis added) of the Commission members come from various sectors of the milk industry, attempting to show a "lack of independence." In fact, *exactly* half of the members (five of ten) come from various sectors of the milk industry, but that fact does not justify the conclusions espoused by F-O-R on page 18. There is no finding of fact by either court below that the Commission members act "individually and in conjunction with other private parties [sic] industry representatives." *Id.* Nor was there any finding of fact by either court which would support the F-O-R conclusion that "The acts complained of in this case are . . . the acts of financially interested individuals." *Id.*

The distinctions between this case and those cases mentioned by F-O-R on page 19 can easily be seen in the light of the language of *Parker:* in none of the cases therein cited by F-O-R did the state "create the machinery for establishing" the program or activity, and act to adopt the program or to enforce it with penal sanctions, in the execution of a governmental policy. 317 U.S. at 352. In *Midcal*, the State simply authorized price filing and enforced the prices set by private parties. 445 U.S. at 105. In *City of Lafayette*, the activity was that of the city, and the Supreme Court affirmed the Court of Appeals'

holding that further inquiry should be made to determine whether the city's actions were directed by the state. In *Cantor*, the state agency passively accepted a public utility's tariff. In *Community Communications, Inc.* v. *City of Boulder, Colo.*, 445 U.S. 40, 102 S.Ct. 835, 70 L. Ed.2d 810 (1982), the court held that the first prong of *Midcal* was not met so the city's moratorium against cable service installation did not qualify for state action immunity.

Much in contrast with the aforementioned cases, cited by F-O-R on page 19, in the case *sub judice* the state did create the machinery for enforcing the prohibition against below-cost sales of milk, and it is the state, "acting through the Commission," 317 U.S. at 352, which enforces it with penal sanctions in the execution of a governmental policy.

III

The Fourth Circuit's Application Of The Midcal Test Does Not Conflict With Holdings Of Other Courts Of Appeal.

A. The Fourth And Ninth Circuits Have No Conflict In Their Interpretation Of The First Prong Of The *Midcal* Test.

It is inconceivable that the Fourth Circuit's holding in this case could conflict with the Ninth Circuit's interpretation of the first prong of the *Midcal* test, as F-O-R asserts. F-O-R's reliance on the Ninth Circuit's holdings in *Knudsen Corporation* v. *Nevada State Dairy Commission*, 676 F.2d. 374 (9 Cir. 1982) and *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9 Cir. 1983) is ill-placed.

Knudsen does not espouse a "strict" construction of *Midcal's* first prong; nor for that matter does the Fourth Circuit in this case set forth a "liberal" or "expansive" interpretation as F-O-R argues. The reason that the Fourth Circuit in this case has no conflict with the Ninth

Circuit in *Knudsen* is that the Ninth Circuit *made no holding at all* in *Knudsen based on the first prong of Midcal.*

The Ninth Circuit in *Knudsen* reviewed the Nevada laws on milk pricing, which required distributors to file lists of wholesale, retail, and distributor or dock prices; sales could not be made below the list price or below cost; importantly, distributor prices did not become effective until seven days after filing, and wholesale price filings were made available to the public. While *Knudsen* dealt primarily with another issue, the court noted on the last page of its opinion that the Nevada Commission argued that there was a cleary stated and articulated state policy to stabilize dairy prices; however, the court there said "but this point may be unimportant in view of the absence of active supervision by the state." 676 F. 2d at 379. The court then pointed out that the Commission simply enforced privately set prices through the mechanism of advance filings. *Id.* Thus, *Knudsen* made a holding only as to *Midcal's* second prong, and not as to *Midcal's* first prong.

In *Title Insurance*, the court found language in the relevant portion of the Arizona statute which reflected "neutrality by the Arizona legislature to competition and uniform rates, not 'a clearly articulated and affirmatively expressed state policy.' " 700 F. 2d at 1253. The court then said:

> Importantly, the state does not require uniform rates; it allows a title insurer to file independent rates separately, to file ndependent rates through a rating bureau, or to deviate from rates filed by a rating bureau on its behalf.

Id.

There is no conflict between the Fourth and Ninth Circuits in the application of *Midcal*. There is merely a difference in facts found in the *Knudsen* and *Title Insurance* cases and the present case. The characterization of the Fourth Circuit's holding as liberal is as hollow as F-O-R's assertion that *Knudsen* stands for a strict interpretation of *Midcal's* first prong. There is no indication by either Circuit that to the same set of facts the *Midcal* first prong would be applied other than in complete harmony. There is no inconsistency of application or result as F-O-R argues; there is only the barren assertion of F-O-R that it is so.

B. The Fourth Circuit's Decision In This Action Does Not Conflict With The Ninth Circuit's View Of The Second Prong Of The *Midcal* Test.

Again, F-O-R fabricates a conflict between the Fourth and Ninth Circuits in their applications of the "state supervision" second prong of *Midcal*. Once again, F-O-R calls for active supervision by the state to be by the state itself. This reasoning must fail, because as previously pointed out in Respondent's brief, under F-O-R's reasoning state action immunity would not even apply to the state commission which was acting in *Parker*.

Miller v. *Oregon Liquor Control Commission*, 688 F.2d 1222 (1982) and *Knudsen* are cases where the Ninth Circuit correctly found insufficient state supervision to satisfy the second prong of the *Midcal* test. In *Miller*, the Ninth Circuit found that Oregon mandated the posting of prices by wholesalers, but did not in any way review the reasonableness of the prices set; the commission merely authorized and enforced the disputed prices. The court pointed out that while the commission " 'may reject any price posting which is in violation of its rules,' (citation) the effect of that rule is simply to effectuate the price

posting and prohibitions on discounts and transportation allowances." 688 F.2d at 1227.

Likewise, *Knudsen* (discussed above) involved another situation where the commission did not set wholesale prices but simply enforced privately set prices through the mechanism of advance filing.

There is no reason to believe that, faced with the same factual situation, the Fourth Circuit would not arrive at the same result in its application of *Midcal's* second prong. Clearly, F-O-R has the burden to show otherwise.

The factual distinctions between *Miller* and *Knudsen* and this case are so clear that a further discussion of *Midcal's* second prong as it relates to this case will not be undertaken.

The Sixth Circuit's *Gambrel* v. *Kentucky Board of Dentistry* 689 F.2d 612 (6 Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1198 (1983) is improperly argued by F-O-R, as to do so is outside Supreme Court Rule 17.1 (a). Nonetheless, it should be noted that the facts in *Gambrel* are dissimilar to *Miller* and *Knudsen*, but are similar to the case *sub judice* in that the state board in *Gambrel* had expressly conferred upon it by statute the powers of enforcement, and, as here, that court found that the enforcement of the statute by the board was one of the compelling reasons for the commencement of that action.

As with the first prong of *Midcal*, there is only the barren assertion by F-O-R of a conflict between the Fourth and Ninth Circuits. There is no liberal or conservative interpretive difference between the two circuits on similar facts, only dissimilar results based on dissimilar facts. Only F-O-R's interpretative distortions of the matters at issue have been liberal.

CONCLUSION

There is neither error in the lower court's decisions in this case nor conflict between the Fourth and Ninth Circuit's decisions relative to the issue in this case. Therefore, F-O-R has failed to satisfy the conditions of Supreme Court Rule 17, and its petition should be denied.

Respectfully submitted,

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No. 84-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLAV-O-RICH, INC.,
Petitioner,

v.

NORTH CAROLINA MILK COMMISSION, HERBERT C. HAWTHORNE, VILA M. ROSENFELD, ANNA G. BUTLER, RUSSELL E. DAVENPORT, CHARLIE L. HARDEE, INEZ M. MYLES, B. F. NESBITT, KATHRYN G. KIRKPATRICK AND DAVID A. SMITH,
Respondents.

REPLY BRIEF OF PETITIONER FLAV-O-RICH, INC. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-51

FLAV-O-RICH, INC.,

Petitioner,

v.

NORTH CAROLINA MILK COMMISSION, HERBERT C. HAWTHORNE, VILA M. ROSENFELD, ANNA G. BUTLER, RUSSELL E. DAVENPORT, CHARLIE L. HARDEE, INEZ M. MYLES, B. F. NESBITT, KATHRYN G. KIRKPATRICK AND DAVID A. SMITH,

Respondents.

REPLY BRIEF OF PETITIONER FLAV-O-RICH, INC. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This case is before the Court on the Petition of Flav-O-Rich, Inc. ["FOR"], requesting that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 12, 1984.

In this Reply Brief FOR addresses the claims—advanced by Respondents, the North Carolina Milk Commission and its individual members, ["Respondents"], in their brief opposing grant of the writ sought by FOR—that the conduct contested by FOR in this action is exempt from antitrust scrutiny under this Court's decisions in *Parker* v. *Brown*, 317 U.S. 341 (1943), ["*Parker*"], and *California Retail Liquor Dealers Association* v. *MidCal Aluminum, Inc.*, 445 U.S. 97 (1980), ["*MidCal*"].

I. THE FOURTH CIRCUIT HAS FAILED TO APPLY PROPERLY THE RULES ENUNCIATED BY THIS COURT IN *PARKER* AND *MIDCAL*.

In response to FOR's Petition to review the lower courts' application of the rules of *Parker* and *MidCal*, Respondents first argue, as they did in both the district court and the court of appeals, that their ". . . action in enforcing the state's statute prohibiting sales of milk below cost is the same as the state itself acting." Respondents' Br. at 8. This, they assert, ought to have ended the lower courts' inquiry. The closer analysis mandated by *MidCal* and by this Court's recent decision in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), when the action challenged is *not* that of the state itself, but of others acting pursuant to state authorization, is not, they assert, required here.

The Respondents' argument ignores the factual finding—made by the district court and affirmed by the Fourth Circuit—that although Respondents are instrumentalities of the state, they are *not* the state itself. App. at 2a, 6a. By this argument Respondents tacitly invite this Court to ignore Rule 52(a) of the Federal Rules of Civil Procedure. However, Respondents have made no showing that the finding they dispute is clearly erroneous. To deny review based upon an assertion which is at variance with the factual findings of the lower courts, without first determining that those findings are clearly erroneous, would be—we respectfully submit—manifestly unfair to both FOR and the lower courts.

That preliminary matter aside, FOR will now discuss the arguments raised by the Respondents as they relate to the legal errors in the Fourth Circuit's application of *Parker* and *MidCal*.

A. Respondents' Unauthorized Dissemination Of Milk Price Data Is Not Entitled To Antitrust Immunity Under *Parker*.

This is not a case which involves the authority of the State of North Carolina to proscribe below cost or predatory pricing of

fluid milk and dairy products as claimed by the Respondents. What is at issue is the anticompetitive and prohibited dissemination by the Respondents of highly sensitive and confidential price data as part of a scheme to set minimum wholesale milk prices in an unauthorized fashion.

The record established in the district court clearly demonstrates the unauthorized manner in which the Respondents have eliminated competition. At a January 13, 1976 Commission meeting, four possible approaches for "stabilizing the industry" were considered:

1. "The most desirable approach for stabilizing the industry would be for the Commission to set prices and control rebates at all levels."
2. "A second approach . . . would be adopting or reinstating a fair trade practice order."
3. "The third suggestion to the committee was that *an investigation of below cost selling by processors might have some merit*. . . . the Asheville market had been suggested as a place to begin such an investigation. . . ."
4. "[A]nother suggestion was that the Commission might see fit to set . . . minimum floor price[s]. . . ."

The Commission considered each of these four ways of "stabilizing the industry" and thus established its true objective—the elimination of competition. Of the four methods proposed by the state's processors to "stabilize the industry" the Commission selected the third—the use of below cost investigations and the filing of price information in connection therewith.[1]

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[1] It is significant to note how the "problem," in which this action has its genesis, arose. Sometime prior to April, 1974, Arcadia Dairy Farms began to import milk powder from Wisconsin, mix it with water and milk solids and sell it as reconstituted milk in the Asheville, North Carolina area at prices less than the price of whole milk. Asheville area processors and producers complained to the Commission, and the Commission adopted a rule which required Arcadia to pay money into an "equalization fund" in order to force up the price of this milk. Arcadia brought an action to have the "equalization rule" declared unlawful, and the North Carolina Supreme Court agreed that

Since that time, the Commission has continued to stabilize wholesale prices in this same unauthorized and prohibited manner. North Carolina statutes clearly provide only for a different and direct method of setting wholesale milk prices if the Commission wishes to do so. This procedure requires notice, public hearings and input from representatives of the milk industry and consumer groups as well. N.C.G.S. §§ 106-266.8(9) and (10). However, the evidence of record demonstrates that the Commission has ignored the required procedures and has instead continued to implement the following procedure of stabilizing prices:

1. The Commission requires a processor to notify the Commission in writing before it makes a "below cost" sale to meet a competitor's price.

2. The Commission has advised all processors that they cannot reduce their prices to meet a competitor's price unless they advise the Commission of the name of the competitor and the competitor's price.

3. Once a processor complains about another processor's prices, the Commission staff investigates the complaint, and advises the complaining processor what price is being charged

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it indeed was unlawful. Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

Despite this rebuff from the North Carolina Supreme Court—the state itself—the Commission remained determined to see that prices increased and were stabilized. Seven days after the court handed down its decision in the *Arcadia* case, the Executive Secretary of the Commission reported to the Commission that "all companies operating in the Asheville market had filed cost data which indicated certain sales by some processors in the Asheville market were being made at prices which were below cost."

One month later, five processors (Biltmore, Sealtest, The Borden Company, FOR and Arcadia Dairy Farms) were cited for selling milk below cost in the Asheville market. Hearings were held on these citations. At those hearings, the Commission staff introduced evidence as to the wholesale prices charged by each of these dairies in a public hearing at which other processors were present. Subsequently, all five processors were found guilty and the Commission's decision *and the processors' prices* were published in a general circulation daily newspaper, the Raleigh News and Observer.

by the processor complained of so that the complaining processor can meet that price.

4. If it is determined that the processor complained of is selling "below cost," a citation is issued and a public hearing is held.

5. At the public hearing, the costs and prices of the complaining dairy are introduced into evidence and can be heard by anyone present.

6. Although the statute which the Commission purports to be enforcing only prohibits "below cost" sales when they are for the purpose of harassing or injuring a competitor and specifically permits a processor to sell milk "below cost" to meet the price of a competitor, the Commission Staff never attempts to determine if the processor complained of was, in fact, attempting to harass or injure a competitor of if he was meeting the prices of competitors.

7. The costs and prices of the processor complained of are attached to the minutes of the Commission's meetings and are given to all Commission members, including the members of the Commission who are in direct competition with such processor.

8. The hearings are often reported in the newspapers, and the processor's prices are sometimes stated.

9. Furthermore, and unrelated to specific "below cost" procedures, if particular prices are part of a "price war," the Commission staff attempts to persuade the processors involved to conspire to raise their prices on their own without resorting to "below cost" procedures.

The district court reviewed this evidence and determined, as a matter of fact, that public disclosure of price and cost data occurred in five separate ways. App. at 8a. The district court also found, as matters of both fact and law, that these disclosures operated to stabilize prices in violation of Section 1 of

the Sherman Act, 15 U.S.C. § 1. App. at 2a, 4a-5a, 9a. Respondents do not dispute this finding.[2]

Each of these five types of disclosure at issue are—we submit—unauthorized by law. As noted in FOR's Petition, these disclosures are unlawful for two reasons.

First, it is the public policy of the State of North Carolina articulated in both its antitrust and its milk laws to foster and preserve competition.[3] The milk law states:

> The sale of milk by any distributor or producer-distributor or retailer below cost for the purpose of injuring, harassing or destroying competition is hereby prohibited; and the offering for sale of milk by a retailer at below-cost prices to induce the public to patronize his store, or what is commonly known in the trade as using milk as a 'loss leader' is also hereby prohibited. However, milk may be sold below cost to meet competition if notice has been sent to the Commission by registered or certified mail identifying the competitor or competitors. At any hearing or trial

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[2] One of the methods used by the Commission has been found by the district court to be unrelated to the Commission's below cost authority. App. at 9a. This particular method of calling processors together at the Commission offices to blatantly discuss the stabilization of prices in "problem" areas, leading to informal agreements sanctioned and in fact sponsored by the Commission to set prices, is particularly egregious and lacks any protection from the cloak of legitimacy the Respondents have tried in their brief to create from their "below cost" authority.

[3] The authority of the State of North Carolina to enforce its prohibition against predatory or below cost pricing is not at issue here. Indeed, were the practice not specifically proscribed by the milk law it would nonetheless be prohibited by the state's antitrust law. N.C.G.S. § 75-5(b)(5) declares that whoever shall:

> . . . willfully destroy or injure, or undertake to destroy or injure, the business of any competitor . . . with the purpose of attempting to fix the price of any goods when the competition is removed

shall be guilty of a violation of law. State v. Atlantic Coal & Ice Co., 210 N.C. 742, 188 S.E. 412 (1936); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973). What petitioner opposes, and what this suit is about, is the unauthorized disclosure of price and cost data assembled by the Respondents in the discharge of their statutory responsibilities.

> on a complaint under this section, evidence of sale of milk by a distributor or subdistributor or retailer below cost shall constitute prima facie evidence of the violation or violations alleged, and the burden of rebutting the prima facie case thus made, by showing that the same was justified in that it was not, in fact, made below cost or that it was not for the purpose of injuring, harassing or destroying competition, or that it was sold below cost to meet competition after notice has been sent to the Commission.N.C.G.S. § 106-266.19.

The district court found, as a matter of fact, that the disclosures effectuated by way of the procedures described above violated the antitrust laws. App. at 2a, 4a-5a, 9a. Because they do, they offend the policy of the State of North Carolina reflected in N.C.G.S. § 106-266.19 to foster and preserve competition.

Second, such disclosure of price and cost data, especially that dissemination unrelated to the Commission's below cost authority, violates both N.C.G.S. § 106-266.8(12) (which requires that only general compilations of pricing and cost information for any marketing area be made public) and § 106-258 (which requires that the plant records of processors regulated by the State Department of Agriculture, such as FOR be treated confidentially) which *specifically* prohibit public dissemination of price and cost data collected by the Commission.

Because the disclosures which give rise to this case are both undeniably anticompetitive and so clearly forbidden by state antitrust policy and by explicit statutory direction, they are not entitled to antitrust immunity under *Parker*. 317 U.S. at 351-52.

B. Respondents' Activities Do Not Satisfy Either Portion Of The Tests For Antitrust Immunity Articulated By This Court In *MidCal*.

In its recent decision in *Hoover* v. *Ronwin*, *supra*, this Court explained that where, as here, the activity challenged as violative of the antitrust laws is that of a state agency or in-

strumentality rather than that of the state itself, closer scrutiny is required. *Id.*, 80 L.Ed.2d at 599-600. That closer analysis must be conducted, this Court held, by use of the two pronged test of *MidCal. Id.*

As we have demonstrated above, the actions challenged in this case—the dissemination of milk price and cost data and the unauthorized stabilization of milk prices—offend the policy of the state to foster and preserve competition as articulated in both the milk and antitrust laws *and* the express statutory command that such information be treated in a confidential manner.

Because the public dissemination of what should be confidential information so offends state law, it is not undertaken pursuant to a "clearly articulated and affirmatively expressed" policy of the state. *MidCal, supra*, 445 U.S. at 105. Indeed, as demonstrated in Section I of FOR's Petition and in Section I, A of this Reply Brief, the challenged activity is, if anything, proscribed by North Carolina policy and law.

The second prong of the *MidCal* test is the requirement that the activity of a state instrumentality or agency be subject to the "active supervision" of the state itself. *MidCal, supra*, 445 U.S. at 105-06; *Hoover* v. *Ronwin, supra*, 80 L.Ed.2d at 599-600. Respondents argue that North Carolina exercised the requisite degree of supervision because the Commission is, by virtue of the political process of appointment, subject to the control of the state. This argument misses the mark.

If all that is required to meet the "active supervision" requirement is appointment by the state, the second prong of *MidCal* would be rendered meaningless. This is particularly true where, as here, those appointed by the state have—in their zeal to arguably meet one part of their responsibilities—trample other specifically imposed restrictions on that conduct.[4] Were Respondents indeed actively supervised by the

[4] In this regard the *Appeal of Arcadia Dairy Farms, Inc., supra*, litigation is instructive. There the North Carolina Supreme Court had to intervene to curb the Respondents' attempt to overreach their statutory authority.

state they would have been unable to make the continuing series of disclosures complained of by FOR, some related to below cost procedure and some not, because such disclosures are expressly forbidden by the state itself. Thus, Respondents' arguments in its brief, that all the disclosures are specifically related to the Commission's pro-competition below cost authority and are thus protected, wholly misses the mark and FOR's petition should be granted.

II. THERE ARE CONFLICTS BETWEEN THE FOURTH AND NINTH CIRCUIT WITH RESPECT TO BOTH *MIDCAL* PRONGS.

In its petition, FOR asserted, *inter alia*, that the Fourth Circuit's decision in this case conflicts with the Ninth Circuit's decisions in *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983), *["Title Insurance"]* and *Miller* v. *Oregon Liquor Control Commission*, 688 F.2d 1222 (1982), ["Oregon Liquor"]. Respondents dispute this claim arguing that the facts of each of these cases are so different that no conflict exists. Respondents' Br. at 21-24. We demonstrate here that it is the distinctions Respondents' suggest—and not the conflicts—which do not exist.

A. North Carolina, Like Arizona, Has A Statutorily Evidenced Interest In Actual Competition.

Respondents claim that the Ninth Circuit's decision in *Title Insurance* is distinguishable from the Fourth Circuit's opinion in this case because the regulatory scheme at issue there was established by a statute which did not clearly articulate and affirmatively express state policy "to restrict competition." *Title Insurance, supra*, 700 F.2d at 1253; Respondents' Br. at 22-23. The Ninth Circuit determined that the Arizona legislature was evidencing "neutrality" with respect to the competing goals of unfettered competition and "the stability and growth of title insurance." *Title Insurance, supra*, 700 F.2d at 1253. Such neutrality, the Ninth Circuit concluded, failed to satisfy the first prong of *MidCal*. *Id.* Even Respondents do not dispute this result. Respondents' Br. at 22-23.

The regulatory scheme at issue in this action is, if anything, reflective of a procompetitive disposition by the North Carolina legislature. As discussed *supra* at 6-7, the North Carolina legislature has manifested a desire that there be *fair* competition in the sale of fluid milk and dairy products in North Carolina in N.C.G.S. § 106-266.19. It is thus evident that North Carolina has no clearly articulated policy—dictated by the legislature—to restrict competition. Indeed, if it has any policy at all it is simply to eliminate predatory pricing and to permit otherwise free and open competition.

Because the North Carolina milk law—like the Arizona title insurance law—does not manifest a clear and unmistakable legislative intent to restrict competition, the Fourth Circuit's decision in this case is different from the Ninth Circuit's in *Title Insurance* only in its result. Thus, there is a clear conflict between the Fourth and Ninth Circuits with respect to the first prong of the *MidCal* test.

B. Like Oregon, North Carolina Does Not Sufficiently Supervise The Regulatory Scheme At Issue.

Respondents assert that the Forth Circuit's decision in this case does not conflict with the Ninth Circuit's decision in *Oregon Liquor* because there the court correctly determined that there was an inadequate measure of state supervision.

In *Oregon Liquor* the determination that state supervision was inadequate was premised upon the Ninth Circuit's factual finding that the Oregon Commission neither "establishes prices nor reviews the reasonableness of prices." *Oregon Liquor, supra*, 688 F.2d at 1226. However, the court also found that Oregon was empowered to and did "effectuate the price posting and the prohibition on quantity discounts and transportation allowances." *Id.* at 1227.

The statutory scheme adopted by the North Carolina legislature admittedly does more than the Oregon scheme. However, it does not " 'displace unfettered business freedom' with its own power." *Id. citing MidCal, supra*, 445 U.S. at 106 n. 9 *quoting New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439

U.S. 96, 109 (1978). Because it does not, a conflict clearly exists between the Fourth and Ninth Circuits with respect to the second prong of the MidCal test. The arguments raised by Respondents in their brief are without merit.

III. CONCLUSION

For all the reasons set forth in its Petition and in this Reply Brief, FOR respectfully submits that its Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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September 17, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 1984, three copies of this Reply Brief were mailed, postage prepaid, to counsel for the Respondents, W.C. Harris, Esq. and F. Stephen Glass, Esq., Harris, Cheshire, Leager & Southern, P. O. Box 2417, Raleigh, North Carolina 27602.

I further certify that all parties required to be served have been served.

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